

**IN THE SUPREME COURT OF MISSOURI**

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EDDIE BAUER, INC.	)	
	)	
Appellant,	)	
	)	No. SC 83870
v.	)	
	)	
DIRECTOR OF REVENUE,	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

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FROM THE ADMINISTRATIVE HEARING COMMISSION OF MISSOURI  
HONORABLE SHARON M. BUSCH, COMMISSIONER

BRIEF OF APPELLANT  
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## **JURISDICTIONAL STATEMENT**

This case involves the questions of (1) whether for purposes of Section 143.801, Appellant is a “taxpayer;” (2) whether under 12 CSR 10-2.045, Appellant timely filed claims for refunds where Appellant was unconstitutionally denied its original right to elect to file Missouri consolidated income tax returns, and subsequently filed refund claims for all open years within the applicable statute of limitations; and (3) whether, if the procedural limitations of Section 143.801 and 12 CSR 10-2.045 prohibited Appellant from being entitled to refunds, the remedies offered under those provisions are adequate as a matter of federal constitutional law.<sup>1</sup>

Because resolution of the questions raised in this appeal require this Court to construe Missouri’s revenue laws, including, among others, Section 143.801.1 and 12 CSR 10-2.045, jurisdiction is proper in this Court under Mo. Const. art. V, § 3.

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<sup>1</sup> Unless otherwise noted, all statutory references are to the 2000 Revised Statutes of Missouri.



## **STATEMENT OF FACTS**

The parties stipulated to the material facts in this case. Appellant, Eddie Bauer, Inc. (“Eddie Bauer”) is a Delaware corporation headquartered in Redmond, Washington. R. 43. Eddie Bauer is a leading specialty retailer of private-label clothing, accessories, and home furnishings. R. 43. Eddie Bauer and several of its affiliates are wholly-owned subsidiaries of Spiegel, Inc. (“Spiegel”), a Delaware corporation based in Downers Grove, Illinois. R. 44.

As an affiliated group, Spiegel, Eddie Bauer, and several of Spiegel’s other subsidiaries (collectively, the “Spiegel Group”) filed federal consolidated income tax returns for the tax years beginning January 1, 1995 through January 1, 1997 (“years at issue”). R. 44. Neither Eddie Bauer itself, nor the Spiegel Group collectively, has ever derived fifty percent or more of its income from sources within Missouri. R. 44.

Eddie Bauer filed its original Missouri income tax returns for the years at issue on a separate company basis. R. 43-44. Eddie Bauer and its affiliates were ineligible for the Missouri consolidated return election in Section 143.431.3(1) at the time Eddie Bauer filed its original returns for the years in dispute because, as the parties stipulated, neither Eddie Bauer nor the Spiegel Group earned fifty percent or more of their income from Missouri sources. R. 44.

In December 1998, this Court ruled that insofar as Section 143.431.1(3) required an affiliated group to earn fifty percent or more of its income from sources within Missouri before the group could elect to file a Missouri consolidated return, the statute violated the Commerce Clause of the U.S. Constitution. *General Motors Corp. v.*

*Director of Revenue*, 981 S.W. 2d 561, 568 (Mo. banc 1998). This Court then severed the offending provision from the statute, and stated that the only condition for making the consolidated return election is that the taxpayer's affiliated group files a federal consolidated return. *Id.*

In April 1999, after this Court handed down its opinion in *General Motors Corp.*, Eddie Bauer timely filed amended Missouri income tax returns (under the business name "Spiegel, Inc., Eddie Bauer, Inc., and Combined Affiliates") on a consolidated basis, claiming refunds for each of the years at issue. R. 47-190. The companies joining in the Missouri consolidated returns are the same companies that made up the Spiegel Group's federal consolidated group for the disputed years. R. 44, 56-75, 82-87, 109, 120-125, 147, 160-165.

On July 2, 1999, Respondent Director of Revenue issued Notices of Adjustment for each of the years at issue, denying Eddie Bauer's refund claims in their entirety. R. 45, 182-186. On August 27, 1999, Eddie Bauer timely protested the Director's denial of its refund claims. R. 45, 187-190. On April 26, 2000, the Director issued a Final Decision, holding that Eddie Bauer is not entitled to any refund for the years at issue. R. 45, 190-197.

Eddie Bauer timely filed its Complaint with the Administrative Hearing Commission ("Commission") on May 22, 2000. R. 1-35, 45. On July 9, 2001, the Commission held that Eddie Bauer was not entitled to relief because its only remedy was to withhold the contested taxes and challenge their validity by filing a protest, and issued

an order denying Eddie Bauer's refund claims. R. 198-211. Eddie Bauer then brought this appeal.

## **POINTS RELIED UPON**

- I. THE ADMINISTRATIVE HEARING COMMISSION ERRED IN DENYING EDDIE BAUER’S REFUND CLAIMS BECAUSE UNDER SECTIONS 621.189 AND 621.193, THE DECISION BELOW IS NOT AUTHORIZED BY LAW OR SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE IN THE RECORD IN THAT EDDIE BAUER HAD NO CONSTITUTIONALLY ADEQUATE PRE-DEPRIVATION REMEDY FOR CHALLENGING THE CONSTITUTIONALITY OF SECTION 143.431.3(1) WITHOUT PENALTY, AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION THUS REQUIRED THE COMMISSION TO PROVIDE EDDIE BAUER WITH A POST-DEPRIVATION REMEDY FOR TAXES EDDIE BAUER PAID UNDER A STATUTE SUBSEQUENTLY INVALIDATED BY THIS COURT.**

*McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S.

18, 36 (1990)

*Reich v. Collins*, 513 U.S. 106, 110-111 (1994)

*Newsweek, Inc. v. Florida Dep’t of Revenue*, 522 U.S. 442, 444 (1998)

*Atchison, T. & S.F.R. Co. v. O’Connor*, 223 U.S. 280, 285-286 (1912)

Section 143.631.1

Section 143.751.1

**II. THE ADMINISTRATIVE HEARING COMMISSION ERRED IN DENYING EDDIE BAUER’S REFUND CLAIMS BECAUSE UNDER SECTIONS 621.189 AND 621.193, THE DECISION BELOW IS NOT AUTHORIZED BY LAW OR SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE IN THE RECORD IN THAT THE MISSOURI REVENUE LAWS PROTECT TAXPAYERS FROM UNLAWFUL EXACTIONS BY PROVIDING BOTH PRE-DEPRIVATION AND POST-DEPRIVATION REMEDIES, AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION THUS PRECLUDED THE COMMISSION FROM DENYING EDDIE BAUER A POST-DEPRIVATION REMEDY ON THE GROUND THAT EDDIE BAUER COULD HAVE PURSUED A PRE-DEPRIVATION ALTERNATIVE.**

*Reich v. Collins*, 513 U.S. 106, 110-111 (1994)

*Newsweek, Inc. v. Florida Dep’t of Revenue*, 522 U.S. 442, 444 (1998)

*North Supply Co.*, 29 S.W.3d 378 379-380 (Mo. banc 2000)

*General Motors Corp. v. Director of Revenue*, 981 S.W. 2d 561, 568 (Mo. banc 1998)

*James M. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 535 (1991)

*McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S.  
18, 36 (1990)

Section 143.431.3

Section 143.631.1

Section 143.801.1

**III. THE ADMINISTRATIVE HEARING COMMISSION ERRED IN DENYING EDDIE BAUER’S REFUND CLAIMS PURSUANT TO 12 CSR 10-2.045 (15) BECAUSE UNDER SECTIONS 621.189 AND 621.193, THE DECISION BELOW IS NOT AUTHORIZED BY LAW OR SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE IN THE RECORD IN THAT IT DENIES EDDIE BAUER RELIEF ON THE GROUND THAT EDDIE BAUER FAILED TO INVOKE THE PRE-DEPRIVATION REMEDY AND TIMELY ELECT TO FILE CONSOLIDATED RETURNS, WHEN THE MISSOURI REVENUE LAWS BARRED EDDIE BAUER FROM MAKING THIS ELECTION.**

*Grynberg v. Commissioner*, 83 T.C. 255, 261 (1984)

*Bayley v. Commissioner*, 35 T.C. 288, 298 (1960)

*Bartlett & Co. Grain v. Director of Revenue*, 649 S.W.2d 220, 224 (Mo.  
1983)

*General Motors Corp. v. Director of Revenue*, 981 S.W. 2d 561, 568 (Mo. banc 1998)

*Maine v. Taylor*, 477 U.S. 131, 148, n.19 (1986)

*New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 278 (1988)

*Pacific Nat'l Co. v. Welch*, 304 U.S. 191, 194 (1938)

*Philadelphia v. New Jersey*, 437 U.S. 617, 626-628 (1978)

12 CSR 10-2.045(15)

Treas. Reg. § 1.1502-75(a)(1)

Section 143.961.2

Section 143.751.1

**IV. THE ADMINISTRATIVE HEARING COMMISSION ERRED IN DENYING EDDIE BAUER'S REFUND CLAIMS UNDER SECTION 143.801.1 BECAUSE UNDER SECTIONS 621.189 AND 621.193, THE DECISION BELOW IS NOT AUTHORIZED BY LAW OR SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE IN THE RECORD IN THAT IT DENIES EDDIE BAUER RELIEF ON THE GROUNDS THAT EDDIE BAUER WAS NOT A "TAXPAYER" BUT GIVEN THE ESSENTIAL PURPOSE OF CONSOLIDATED FILING, EDDIE BAUER WAS A "TAXPPAYER" AS A MATTER OF LAW WHO TIMELY FILED ITS**

**CONSOLIDATED, AMENDED RETURNS AND IS THEREFORE  
ENTITLED TO A RETROACTIVE REMEDY.**

*Hamacher v. Director*, 779 S.W. 2d 565, 567 (Mo. 1989)

*Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 94 (1993)

*Artman v. State Bd. of Registration for Healing Arts*, 918 S.W. 2d 247, 252  
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*General Motors Corp. v. Director of Revenue*, 981 S.W. 2d 561, 568 (Mo.  
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*Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372 (1910)

*Mid-American Television Co. v. State Tax Comm'n*, 652 S.W.2d 674, 680  
(Mo. banc 1983)



## **ARGUMENT**

### **INTRODUCTION**

#### **A. The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution Requires Missouri to Grant Eddie Bauer's Refund Claims.**

Eddie Bauer filed Missouri income tax returns and paid Missouri income taxes under a statute that this Court later declared unconstitutional because it conditioned the right to file Missouri consolidated returns on where a consolidated group locates its business activities. *See General Motors Corp.*, 981 S.W.2d at 568. But when Eddie Bauer asked for a refund, the Commission ruled that, even though denying Eddie Bauer's refund claims may itself be unconstitutional, Eddie Bauer is not entitled to relief because it did not invoke the "procedural protections" in the Director's regulations and challenge the contested taxes before paying them.

The Commission's decision is contrary to the law because it rests on an administrative rule that logically and legally could not have applied to Eddie Bauer, and because it elevates the formalities of this rule over Eddie Bauer's due process right to be free from "unlawful exactions." *See McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 36 (1990); *North Supply Co. v. Director of Revenue*, 29 S.W.3d 378, 379 (Mo. banc 2000) (holding that under the Due Process Clause, states must provide taxpayers with procedural safeguards against illegal taxes).

#### **B. Standard of Review.**

In regard to each of the points discussed below, this Court will affirm the Commission's decision only if it is: "authorized by law and supported by competent and substantial evidence upon the whole record . . . ." See Section 621.193. In correcting errors of law, this Court exercises its independent judgment and reviews *de novo* all the Commission's interpretations, applications or conclusions of law. *All Star Amusement, Inc. v. Director of Revenue*, 873 S.W.2d 843, 844 (Mo. banc 1994), citing *Sneary v. Director of Revenue*, 865 S.W.2d 342, 344 (Mo. banc 1993). Taxing statutes and regulations must be strictly construed in favor of the taxpayer. *St. Louis Country Club v. Admin. Hearing Comm'n*, 657 S.W.2d 614 (Mo. banc 1983).

**I. THE ADMINISTRATIVE HEARING COMMISSION ERRED IN DENYING EDDIE BAUER'S REFUND CLAIMS BECAUSE UNDER SECTIONS 621.189 AND 621.193, THE DECISION BELOW IS NOT AUTHORIZED BY LAW OR SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE IN THE RECORD IN THAT EDDIE BAUER HAD NO CONSTITUTIONALLY ADEQUATE PRE-DEPRIVATION REMEDY FOR CHALLENGING THE CONSTITUTIONALITY OF SECTION 143.431.3(1) WITHOUT PENALTY, AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION THUS REQUIRED THE COMMISSION TO PROVIDE EDDIE BAUER WITH A POST-DEPRIVATION REMEDY FOR TAXES**

**EDDIE BAUER PAID UNDER A STATUTE SUBSEQUENTLY  
INVALIDATED BY THIS COURT.**

The Supreme Court has long held that due process requires states to offer taxpayers procedural safeguards against “unlawful exactions.” *See e.g., McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 36 (1990); *Atchison, T. & S.F.R. Co. v. O’Connor*, 223 U.S. 280, 285-286 (1912). The Supreme Court has held that the states may discharge this constitutional responsibility by offering a predeprivation remedy, allowing a taxpayer to litigate the validity of a tax before paying it; a postdeprivation remedy, allowing a taxpayer to pay the contested tax and then seek a refund; or some combination of the two. *McKesson Corp.*, 496 U.S. at 37; *Reich v. Collins*, 513 U.S. 106, 110-111 (1994); *Newsweek, Inc. v. Florida Dep’t of Revenue*, 522 U.S. 442, 444 (1998).

The Missouri income tax laws offer taxpayers both predeprivation and postdeprivation alternatives for contesting the validity of a tax. In Section 143.631.1, the law allows taxpayers to challenge the validity of an income tax, without paying it first, by filing a protest with the Director and requesting an informal hearing. And in Section 143.801.1, the law allows taxpayers to contest the legality of a tax by first paying it and then suing for a refund—which is the remedial alternative Eddie Bauer chose in this case. R. 1-35, 47-181.

In the decision below, the Commission found that Eddie Bauer and its affiliates were “limited to [the] predeprivation relief [in Section 143.631.1]” and that Eddie Bauer’s refund claims must be denied because Eddie Bauer failed to timely pursue this

alternative. R. 210. Under these circumstances, this remedial scheme does not satisfy Missouri's obligations under the federal Due Process Clause.

The U.S. Supreme Court has held that a predeprivation remedy is adequate under the Due Process Clause only when the taxpayer may pursue it without being penalized. *McKesson Corp.*, 496 U.S. at 31-32, 38, n.21. It is under this theory that the Court has also held that where, as here, a state penalizes taxpayers for not paying their taxes in a timely fashion —requiring them to pay the contested taxes first and then seek a refund, the Due Process Clause compels the state to provide “meaningful backward-looking relief” from taxes already paid under a law ultimately declared unconstitutional. *Id.* at 22, 31.

Missouri's income tax law states that if any part of an income tax deficiency is due to a taxpayer's intentional disregard of the rules, the taxpayer will be penalized for it. Section 143.751.1. Yet, the Commission holds that Eddie Bauer's only alternative for challenging the validity of the fifty percent threshold requirement in Section 143.431.3(1) was to have intentionally disregarded the statute's requirements, which Eddie Bauer of course did not meet, and filed consolidated returns. R. 210. This is precisely what the Due Process Clause prohibits. *McKesson Corp.*, 496 U.S. at 31-32, 38, n.21.

The predeprivation alternative that the Commission would have had Eddie Bauer pursue in this case is constitutionally insufficient. Under the Supreme Court's due process cases, the Commission cannot hold that Eddie Bauer is limited to a predeprivation remedy when Eddie Bauer would be penalized for choosing that

alternative, and then hold that Eddie Bauer in essence waived its constitutional right to “meaningful backward-looking relief” by not choosing it. *See id.*

**II. THE ADMINISTRATIVE HEARING COMMISSION ERRED IN DENYING EDDIE BAUER’S REFUND CLAIMS BECAUSE UNDER SECTIONS 621.189 AND 621.193, THE DECISION BELOW IS NOT AUTHORIZED BY LAW OR SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE IN THE RECORD IN THAT THE MISSOURI REVENUE LAWS PROTECT TAXPAYERS FROM UNLAWFUL EXACTIONS BY PROVIDING BOTH PRE-DEPRIVATION AND POST-DEPRIVATION REMEDIES, AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION THUS PRECLUDES MISSOURI FROM DENYING EDDIE BAUER A POST-DEPRIVATION REMEDY ON THE GROUND THAT EDDIE BAUER COULD HAVE PURSUED A PRE-DEPRIVATION ALTERNATIVE.**

At the time Eddie Bauer filed its original Missouri income tax returns for the years at issue—which Eddie Bauer filed on a separate company basis, the income tax law allowed taxpayers to make an election to file a Missouri consolidated income tax return if the taxpayer filed a federal consolidated income return, and if the taxpayer’s affiliated group earned at least half its income from sources within the state. *See* Section 143.431.3(1).

Eddie Bauer and the Director have stipulated that, as part of the Spiegel Group, Eddie Bauer filed federal consolidated income tax returns for each of the years at issue, but that neither Eddie Bauer itself, nor the Spiegel Group collectively, ever derived fifty percent or more of its income from sources within Missouri. R. 44. Thus, at the time Eddie Bauer filed its original returns for the years at issue, it was precluded from making the consolidated return election as a matter of law.

In *General Motors Corp.*, this Court held that, insofar as Section 143.431.3(1) required an affiliated group to derive at least half its income from in-state sources before the group could elect to file a Missouri consolidated return, the statute violated the Commerce Clause of the U.S. Constitution. *General Motors Corp.*, 981 S.W.2d at 568. This Court then severed the offending provision from the statute, and stated that the only condition for making the consolidated return election is that the taxpayer's affiliated group files a federal consolidated return. *Id.*

Eddie Bauer—as a member of the Spiegel Group—satisfied this singular condition for each of the years at issue. R. 44. Eddie Bauer thus filed amended Missouri income tax returns, on a consolidated basis, seeking refunds for those years. R. 47-181. The Director determined that Eddie Bauer was not entitled to a refund, and the Commission agreed. R. 191-197, 210-211.

The Commission concluded that Eddie Bauer was not entitled to a refund of taxes paid under a statute that violated the Commerce Clause because Eddie Bauer did not elect to file its original returns for the years at issue on a consolidated basis. R. 206, 210. The Commission thus holds that Eddie Bauer in effect waived its right to be free from

discrimination against interstate commerce because, unlike the taxpayer in *General Motors Corp.*, who withheld the contested taxes and protested the proposed assessment, Eddie Bauer instead paid the taxes and filed refund claims. *See General Motors Corp.*, 981 S.W.2d at 563.

The Commission's decision, that Eddie Bauer forfeited its constitutional rights by choosing the wrong remedy, cannot be squared with the Supreme Court's Due Process Clause cases. These cases hold that, under the Due Process Clause, the states are obligated to offer taxpayers procedural safeguards against "unlawful exactions," and that, to this end, states may offer either a predeprivation remedy, a postdeprivation remedy, or a combination of the two. *McKesson Corp.*, 496 U.S. at 36-37; *Newsweek, Inc.*, 522 U.S. at 444; *Reich*, 513 U.S. at 110-111.

But the states' authority in devising and administering remedial schemes is not without limits. *James M. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 535 (1991). Indeed, what a state may not do is hold out a "clear and certain" postdeprivation remedy and then deny a taxpayer relief because the taxpayer could have chosen a predeprivation alternative. *Newsweek, Inc.*, 522 U.S. at 444; *Reich*, 513 U.S. at 113; *see North Supply Co.*, 29 S.W.3d at 379-380. That is precisely what Missouri has done here.

In *Reich v. Collins*, the Supreme Court held that, under the Due Process Clause, a state may not offer "what plainly appears to be a 'clear and certain' postdeprivation remedy and then declare, only after the disputed taxes have been paid, that no such remedy exists." *Reich*, 513 U.S. at 108. It continued, explaining that a state cannot deny a taxpayer relief on the ground that the state offered a predeprivation remedy when "no

reasonable taxpayer” would believe that, in view of the apparent applicability of a postdeprivation alternative, the predeprivation remedy was the exclusive safeguard against unlawful exactions. *Id.* at 113.

The analysis in *Reich* is controlling here. Like the remedial statutes in dispute in *Reich*, the Missouri income tax laws allow taxpayers like Eddie Bauer to challenge the constitutionality of an income tax statute by either withholding the taxes the Director proposes to assess and filing a protest, which is what the taxpayer did in *General Motors Corp.*, or paying the disputed taxes and then seeking a refund, which is what Eddie Bauer did in the case here. Sections 143.631.1, 143.801.1; *General Motors Corp.*, 981 S.W.2d at 563, R. 47-181.

Eddie Bauer was entitled by state law to challenge the validity of the fifty percent threshold requirement by paying the taxes shown due on its original, separate company returns, and then filing amended returns claiming refunds. The fact that Eddie Bauer could have instead violated the law by ignoring the statute’s fifty percent threshold requirement, filed its original returns on a consolidated basis, and then contested a proposed assessment is, from a constitutional perspective, entirely beside the point.

In *Reich*, the Supreme Court ruled that that a state cannot play shell games with taxpayer remedies when no “reasonable taxpayer” would believe that, in view of the apparent applicability of a postdeprivation remedy, the predeprivation remedy was the taxpayer’s only alternative. *Reich*, 513 U.S. at 111-113. Although the Commission did not weigh Eddie Bauer’s constitutional claim, *see* R. 210, it did suggest that it was not



reasonable for Eddie Bauer to rely on the availability of the refund claim alternative in Section 143.801.1. R. 208-9..

The Commission states that Eddie Bauer is a sophisticated corporate taxpayer that “should have foreseen the problem [*i.e.*, the unconstitutionality of the fifty percent threshold requirement] presented by the current situation” and withheld the contested taxes like the taxpayer in *General Motors Corp.*. R. 208-209. Yet, the Commission identifies no authority for the proposition that choosing between two, plainly non-exclusive remedies, *e.g.*, Sections 143.631.1, 143.801.1, is not reasonable, no matter how sophisticated the taxpayer may be. Nor does it explain how, even if Eddie Bauer had shared General Motors’s foresight, the refund claim alternative Eddie Bauer chose was any less available, or why Eddie Bauer was any less reasonable for choosing it.

The U.S. Supreme Court has held, and this Court has acknowledged, that when a state offers taxpayers a “clear and certain” postdeprivation remedy, the Due Process Clause prevents the state from denying the taxpayer relief on the ground that the taxpayer might have pursued a predeprivation alternative. *Newsweek, Inc.*, 522 U.S. at 444; *North Supply Co.*, 29 S.W.3d at 379-380. In denying Eddie Bauer relief from taxes collected in violation of the Commerce Clause, the state denies Eddie Bauer its rights under the Due Process Clause.

The Commission itself suggested as much when it stated that “[w]e acknowledge that a court may find that due process considerations outweigh the procedural analysis on which we rest our decision.” R. 210. That is precisely Eddie Bauer’s point: the Due Process Clause prohibits Missouri from denying Eddie Bauer’s refund claims on the

ground that Eddie Bauer could have instead withheld the contested taxes and filed a protest with the Director.

**III. THE ADMINISTRATIVE HEARING COMMISSION ERRED IN DENYING EDDIE BAUER'S REFUND CLAIMS PURSUANT TO 12 CSR 10-2.045(15) BECAUSE UNDER SECTIONS 621.189 AND 621.193, THE DECISION BELOW IS NOT AUTHORIZED BY LAW OR SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE IN THE RECORD IN THAT THE DECISION BELOW DENIES EDDIE BAUER RELIEF ON THE GROUND THAT EDDIE BAUER FAILED TO INVOKE THE PRE-DEPRIVATION REMEDY AND TIMELY ELECT TO FILE CONSOLIDATED RETURNS, WHEN THE MISSOURI REVENUE LAWS BARRED EDDIE BAUER FROM MAKING THIS ELECTION.**

The Commission stated that the basis for its decision against Eddie Bauer is that Eddie Bauer failed to follow Missouri's consolidated return regulations and make a timely election to file consolidated returns for the years at issue. R. 206, 210. Here, the Commission notes that the Director's regulation requires taxpayers to make the consolidated return election on or before the due date for the return, and that since Eddie Bauer filed separate company returns for years in dispute, it did not meet this requirement. R. 208-209; 12 CSR 10-2.045(15). This regulation does not, and indeed cannot, apply to Eddie Bauer.

The Commission's decision to the contrary is based on the factually, logically, and legally false premise that Eddie Bauer had an "election" to make in the first place. Again, at the time Eddie Bauer filed its original, separate company returns, the law required a consolidated group to have at least fifty percent of its income from in-state sources before the group could elect to file consolidated Missouri returns—a requirement that Eddie Bauer concedes it did not meet. R. 44; *see* Section 143.341.3(1).

Eddie Bauer thus did not "elect" to file separate company returns for the years at issue; it was required to file them as a matter of law. The Commission gives no weight to this fact, insisting that if Eddie Bauer wanted to protect itself from Missouri's "unlawful exaction," it should have disregarded the fifty percent threshold requirement in the statute and complied with the Director's regulation and filed consolidated returns—returns which would have prompted the Director to issue a tax and penalty assessment against Eddie Bauer. R. 208-210; *see General Motors Corp.*, 981 S.W.2d at 563.

The stated rationale for the preeminence of the Director's regulation is that the regulation is modeled after its federal counterpart, and that the state and federal consolidated return rules provide tax authorities with an accurate depiction of a taxpayer's historic liability. R. 206-208; *compare* 12 CSR 10-2.045(15) *with* Treas. Reg. § 1.1502-75(a)(1). That Missouri's income tax rules are patterned after the federal income tax rules is fair enough. But it does not justify denying Eddie Bauer relief because it failed to make an election the law prevented it from making.

The income tax law states that the Director's rules, including the consolidated return rules, should be interpreted using federal precedents. Section 143.961.2. The

decision below is totally out of step with those authorities. In federal tax law, the “doctrine of election” holds that an election under the tax laws is valid only when the taxpayer has a free choice between two or more alternatives. *Grynberg v. Commissioner*, 83 T.C. 255, 261 (1984); *Bayley v. Commissioner*, 35 T.C. 288, 298 (1960); see *Pacific Nat’l Co. v. Welch*, 304 U.S. 191, 194 (1938). In that following the Director’s regulation and filing consolidated returns for the years at issue would have compelled Eddie Bauer to break the law, it cannot fairly be said that Eddie Bauer had a free choice in whether it would file separate company or consolidated returns.

An election between following the law and violating the law is no election at all. Indeed, an election by definition presupposes that the party is free from legal compulsion in making it. The revenue laws provide that if any part of an income tax deficiency is due to a taxpayer’s intentional disregard of the rules, the taxpayer will be penalized for it. Section 143.751.1. Yet, as the Commission would have it, Eddie Bauer should have forsaken its legal right to pay the contested taxes and file a refund claim in favor of an election the law barred it from making, and face a five percent penalty for doing it. See *id.*

The income tax laws state, as the decision below notes, that the state’s tax regulations, including the consolidated return regulation, are modeled after their federal counterparts to aid the Director in enforcing Missouri’s tax laws. Section 143.961.2; R.206-207; see *Bartlett & Co. Grain v. Director of Revenue*, 649 S.W.2d 220, 224 (Mo. 1983) (stating that the irrevocability of an apportionment election facilitated the preparation of tax returns and aided the Director’s enforcement of the tax laws).

This too, is fair enough. But surely that does not mean that the Director's pursuit of streamlined administration of the state's tax laws overrides the constitutionality of their enforcement in this case. *See generally, Philadelphia v. New Jersey*, 437 U.S. 617, 626-628 (1978); *Maine v. Taylor*, 477 U.S. 131, 148, n.19 (1986); *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 278 (1988) (finding that a state may not advance its legitimate goals by means that discriminate against interstate commerce).

The Missouri income tax rules, including the consolidated return rules, piggyback on their federal counterpart and are interpreted using federal precedents. Section 143.961.2. These precedents stand for the proposition that one can make an election under the tax laws only where, unlike here, the taxpayer has a free and meaningful choice between two, presumably lawful, alternatives. *See Grynberg*, 83 T.C. at 261. The decision below hinges on the false premise that Eddie Bauer had a free choice between filing separate company or consolidated returns. The decision is unauthorized by law and it should be reversed.

**IV. THE ADMINISTRATIVE HEARING COMMISSION ERRED IN DENYING EDDIE BAUER'S REFUND CLAIMS UNDER SECTION 143.801.1 BECAUSE UNDER SECTIONS 621.189 AND 621.193, THE DECISION BELOW IS NOT AUTHORIZED BY LAW OR SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE IN THE RECORD IN THAT IT DENIES EDDIE BAUER RELIEF ON THE GROUNDS THAT EDDIE BAUER WAS NOT A "TAXPAYER" BUT GIVEN THE ESSENTIAL PURPOSE OF**

**CONSOLIDATED FILING, EDDIE BAUER WAS A “TAXPPAYER”  
AS A MATTER OF LAW WHO TIMELY FILED ITS  
CONSOLIDATED, AMENDED RETURNS AND IS THEREFORE  
ENTITLED TO A RETROACTIVE REMEDY.**

**A. Eddie Bauer and its Affiliates are Entitled to Refunds on a  
Consolidated Basis, Regardless of Which Entity Filed the  
Original and Amended Returns.**

The Commission found on the one hand that “[o]bviously, the issue [in this case] is entitlement to a refund on the basis of consolidated filings, *regardless of which entity may be the nominal party.*” R. 201 (emphasis added). Yet it concluded on the other hand that Eddie Bauer is not entitled to relief because the refund claims, *i.e.*, the consolidated returns, were filed not under Eddie Bauer’s own name, but under the name “Spiegel, Inc., Eddie Bauer, Inc., and Combined Affiliates.” R. 47-181, 209-210.

This conclusion is contrary to the law. As this Court has held, the very purpose of allowing corporations to file a consolidated return is to permit corporate affiliates to be treated as if they were one corporation. *General Motors Corp.*, 981 S.W.2d at 563, *citing Mid-American Television Co. v. State Tax Comm’n*, 652 S.W.2d 674, 680 (Mo. banc 1983). The Commission found that the affiliates joining in the Missouri consolidated returns for the years at issue are the same affiliates making up the Spiegel Group’s federal consolidated group. R. 56-75, 82-87, 109, 120-125, 147, 160-165, 200.

As the Commission stated in the decision below, the issue in this case is whether *someone* is entitled to relief on a consolidated basis, regardless of which entity is the nominal party. R. 201. In view of the “essential purpose” behind the state’s consolidated return provisions, Eddie Bauer and its affiliates, *i.e.*, the Spiegel Group, should be treated as a single business as a matter of law —no matter what “business name” may appear at the top of the refund claims in dispute. *See General Motors Corp.*, 981 S.W.2d at 563.

The Commission’s conclusion to the contrary goes hand in hand with its conclusion that Eddie Bauer should have disregarded the law’s fifty percent threshold requirement and filed consolidated Missouri returns from the outset: In that the law barred Eddie Bauer from filing Missouri consolidated returns with Spiegel, Inc. —the common parent on the Spiegel Group’s federal consolidated return, R. 82, 120, 160, or with any other affiliate, for that matter, it is legally meaningless to state that Eddie Bauer did not disclose Spiegel, Inc. as the common parent on its original returns.

**B. Although the Statute of Limitations Issue Raised in the Decision Below is Not Properly Before this Court, Eddie Bauer Filed Its Refund Claim for the 1995 Year Within the Time Period Prescribed by Law.**

The Commission suggested —but did not find— that Eddie Bauer’s refund claim for the 1995 tax year may be time-barred. R. 210. In so doing, the Commission acknowledged that the Director has never raised the statute of limitations issue in this case. R. 210. Because the Director did not raise this issue below, and because the

Commission made no finding on it, the issue is not properly before this Court. *See Artman v. State Bd. of Registration for Healing Arts*, 918 S.W. 2d 247, 252 (Mo. 1996).

In any event, there is no evidentiary basis for the Commission's speculation here. The Commission made no findings of fact supporting its statement that the refund claim for the 1995 tax year might have been untimely, and there is nothing in the record establishing the date Eddie Bauer filed its original return for this year. But even if the Court does consider this issue, it should find in favor of Eddie Bauer. Eddie Bauer filed its original return for this year on October 12, 1996 —before the extended due date.

When a taxpayer files its return before an established due date, the return is considered to have been filed on the last day of the original or extended due date for purposes of the three-year statute of limitations for filing refund claims. *See Hamacher v. Director*, 779 S.W. 2d 565, 567 (Mo. 1989). Eddie Bauer is therefore presumed to have filed its original return for the 1995 tax year on October 15, 1996, the last day of the extension period for this year. Eddie Bauer filed its refund claim for this year on April 19, 1998, well within the three-year period prescribed by law. R. 47-48, 103; Section 143.801.1.

**C. This Court's Decision in *General Motors, Inc.* Must Be  
Applied Retroactively.**

The Commission states that "the essential issue in this case" is whether this Court's decision in *General Motors Corp.* should be given retroactive effect. R. 199. The Supreme Court's cases resolve this question in the affirmative. As the Supreme



Court has noted, “the fundamental rule of retrospective operation” has “reigned for nearly a thousand years,” and remains “the overwhelming norm.” *Harper v. Virginia Dep’t of Taxation*, 509 U.S. 86, 94 (1993), *citing Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372 (1910); *James M. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 535 (1993).

And as it has held, the application of a rule of federal law (*e.g.*, constitutional law) to the parties before the Court requires every court to give retroactive effect to that decision. *Harper*, 509 U.S. at 90. The decision below identifies no reason why the thousand-year reign of retrospective operation should come to an end now, or why this Court’s decision in *General Motors Corp.* should not apply retrospectively.

### **CONCLUSION**

The Due Process Clause prevents Missouri from holding out a “clear and certain” postdeprivation remedy like the income tax refund claim procedure in Section 143.801.1 and then, only after the disputed taxes have been paid, denying a taxpayer like Eddie Bauer relief on the ground that it could have chosen the predeprivation, protest alternative in Section 143.631.1. *Reich*, 513 U.S. at 111-113; *North Supply Co.*, 29 S.W.3d at 379-380.

The decision below holds in essence that Eddie Bauer is not entitled to this due process protection because Eddie Bauer did not follow the Director’s rules and make an “election” Missouri law prohibited it from making in the first place. As the Commission itself contemplated, what it calls its “procedural analysis” cannot be squared with the Supreme Court’s Due Process Clause cases. The decision below should be reversed, and Eddie Bauer’s refund claims should be granted.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that true and accurate copies on paper and disk of the foregoing were mailed first class, postage prepaid, this 15th day of October, 2001, to James R. Layton, State Solicitor, Supreme Court Building, 207 West High Street, P.O. Box 899, Jefferson City, Missouri 65102.

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**CERTIFICATE REQUIRED BY SPECIAL RULE 1(C)**

I hereby certify that the foregoing brief includes the information required by Supreme Court Rule 55.03 and that it complies with the limitations contained in Supreme Court Special Rule 1(b). The foregoing brief contains 6,656 words. The undersigned also certifies that the disk simultaneously filed with the briefs filed with this Court under Supreme Court Rule 84.05(a) has been scanned for viruses and is virus-free.

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